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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 315

NAT ROGAN, AS UNITED STATES COLLECTOR OF
INTERNAL REVENUE AT LOS ANGELES, CALIFORNIA,
PETITIONER

v.

SAMSON TIRE & RUBBER CORPORATION,
A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

The Solicitor General, on behalf of the Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered in the above cause, reversing the judgment of the District Court of the United States for the Southern District of California.

OPINION BELOW

The District Court's findings of fact and conclusions of law (R. 40-93) are unreported. The

(1)

opinion of the Circuit Court of Appeals (R. 1073-1079) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 1, 1943 (R. 1080). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Section 602 of the Revenue Act of 1932, enacted June 6, 1932, imposed an excise tax upon the sale of rubber tires by the manufacturer, but, pursuant to Section 629, the tax was not to become effective until June 21, 1932. The respondent taxpayer, a subsidiary of the United States Rubber Company, had on hand a large quantity of tires which it had manufactured and which, if it should sell them after June 21, 1932, would be subject to tax. By contract executed June 15, 1932, "as of June 1, 1932", for the purpose of avoiding the tax, it purported to "sell" its entire inventory to United States Rubber Products, Incorporated, a wholly owned subsidiary of the United States Rubber Company, and the Products Company, in turn, sold the tires to the trade after June 21, 1932. The question presented is whether the interposition of the Products Company was effective to relieve respondent of the tax.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 602. TAX ON TIRES AND INNER TUBES.¹

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

(1) Tires wholly or in part of rubber, 2¼ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

(2) Inner tubes (for tires) wholly in part of rubber, 4 cents a pound on total weight, to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

STATEMENT

On June 1, 1932, the taxpayer and the United States Rubber Products, Incorporated, were subsidiaries of the United States Rubber Company. (R. 43, 44.)

The taxpayer was a Delaware corporation which had been, since 1928, manufacturing and selling tires, tubes, and accessories. (R. 40.) On June 1, 1932, out of 165,010 shares of the taxpayer's common (voting) stock outstanding, 160,185 shares

¹ Section 629 provided that the title containing Section 602 "shall take effect on the fifteenth day after the enactment of this Act." Accordingly, since the 1932 Act was enacted June 6, 1932, the effective date of the tax was June 21, 1932.

were held by Samson Corporation, all of whose voting stock was owned by Meyer Rubber Company, which was in turn wholly owned by United States Rubber Company, 310 shares were owned by Meyer Rubber Company, and 4,515 by various persons. Out of 80,000 shares of the taxpayer's convertible preferred stock outstanding, 59,929 shares were owned by Samson Corporation, 20,000 by Meyer Rubber Company, and 71 by various persons; 5,769 outstanding shares of taxpayer's nonconvertible preferred stock were owned by various persons. (R. 43.)

United States Rubber Products, Incorporated, was a wholly owned subsidiary of United States Rubber Company, distributing the latter's products to the public. (R. 42.)

United States Rubber Company was a New Jersey corporation, engaged directly or indirectly in the manufacture and sale of tires, tubes, and other rubber products. (R. 42.)

Prior to June 1, 1932, the taxpayer had been marketing its production through United States Rubber Company under a contract of January 1, 1931. Under this contract, the taxpayer supplied United States Rubber Company with all the tires, tubes, and accessories called for by the United States Rubber Company and bearing the brands specified by the United States Rubber Company and made deliveries of such products to the United States Rubber Company and its branches on consignment, the United States Rubber Company thus acting in effect as the taxpayer's selling agent.

This took the greater part but not all of the taxpayer's production, the taxpayer continuing to supply its own customers. Under this contract, the taxpayer received the price at which the products were sold by United States Rubber Company and bore the manufacturing and selling costs. (R. 44-54, 380-417.)

As of June 1, 1932, the taxpayer and United States Rubber Products, Incorporated, entered into a contract (which was not executed and acknowledged until June 15th and June 13th, 1932, respectively), whereby the taxpayer "sold" to Rubber Products all the tires, tubes, and accessories which the taxpayer had then on hand and all of the same articles which should be manufactured or acquired by the taxpayer thereafter. (R. 10, 55.) Under this contract, the merchandise on hand was to become the property of Rubber Products at once, and that to be manufactured was to become its property as and when the articles were manufactured or acquired by the taxpayer. (R. 11-12.) The price to be received by the taxpayer was cost of manufacture or acquisition plus five percent. (R. 12.) The agreement was to continue until terminated by thirty days' notice in writing. (R. 13.) As of June 1, 1932, a contract was entered into between the United States Rubber Company and United States Rubber Products, Incorporated, its wholly owned subsidiary, which was identical in terms with the contract of the same date between the taxpayer and Rubber Products. (R. 56-57.)

As of June 1, 1932, the United States Rubber Company, United States Rubber Products, Incorporated, Samson Corporation, and the taxpayer all had interlocking officers and directors. F. B. Davis, Jr., was chairman of the board and a director of the taxpayer corporation, president of Samson Corporation, president of Rubber Products and chairman of the board of the Rubber Company. (R. 60-62.)

As of June 21, 1932, a contract was entered into between the taxpayer and United States Rubber Products, Incorporated, whereby the contract of June 1, 1932, was cancelled and the taxpayer agreed to consign its tires, tubes, etc., to Rubber Products, title to the merchandise to continue in the taxpayer until the goods were sold by Rubber Products, when the title to the proceeds from the sale would be in the taxpayer until Rubber Products paid the taxpayer. (R. 57-59.)

As of June 21, 1932, an identical contract was entered into between the United States Rubber Company and its wholly owned subsidiary, United States Rubber Products, Incorporated. (R. 59.)

The District Court found that the motive in carrying out the transfer of June 1, 1932, was to avoid the payment of the tax; that the transfer served no business purpose; that at all times the United States Rubber Company exercised complete control by stock ownership of the policies, affairs, and transactions of the taxpayer and of Rubber Products; that the taxpayer was operated

in effect and practice as a division of the United States Rubber system; that the transfer was dictated and arranged by the United States Rubber Company; that the transfer was not valid or *bona fide* for federal excise tax purposes; and that after the transfer, the taxpayer, for federal excise tax purposes, was still the owner of the inventory purportedly transferred. (R. 89-90.)

The Commissioner of Internal Revenue had determined that the purported sale of June 1, 1932, was ineffective to transfer the taxable articles from the taxpayer to Rubber Products, and that the taxpayer remained the owner of the articles for the purpose of the excise tax, and had determined and assessed against the taxpayer on the sales of the taxable articles after June 21, 1932, the effective date of the tax, excise taxes in the amount of \$39,940.45, with interest of \$16,215.45, making a total of \$56,155.90, which the taxpayer paid. (R. 28.) The taxpayer filed a timely claim for refund of the amount, and upon the rejection of the claim by the Commissioner brought this action against the Collector to recover the amount. (R. 9, 10, 28.) The District Court entered judgment for the defendant and this judgment was reversed by the Circuit Court of Appeals.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In setting aside the finding of the District

Court that no business purpose was served by the transfer, and in holding that the evidence showed that the agreement had a business purpose.

2. In rejecting the finding of the District Court that the taxpayer was a mere instrumentality of the United States Rubber Company and that the taxpayer was operated as a division of the United States Rubber system.

3. In holding that the principles announced in such cases as *Griffiths v. Commissioner*, 308 U. S. 355; *Higgins v. Smith*, 308 U. S. 473; and *Continental Oil Co. v. Jones*, 113 F. 2d 557 (C. C. A. 10th), are inapplicable where minority stockholders are involved.

4. In holding that the agreement of June 1, 1932, was valid and effective to transfer the property in the taxable articles for purposes of the Revenue Act.

5. In holding that the excise tax imposed by Section 602 of the Revenue Act of 1932 was not imposed with respect to the tires and tubes described in the agreement.

6. In holding that the \$56,155.90 collected from the taxpayer was illegally collected and should be refunded.

7. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals is in conflict with *Continental Oil Co. v. Jones*, 113

F. 2d 557 (C. C. A. 10th). There it was held that purported sales made by a corporation to its wholly owned subsidiaries just prior to the effective date of the tax imposed on gasoline and lubricating oil by Sections 601 (c) and 617 (a) of the Revenue Act of 1932 were not effective for the purpose of avoiding the excise tax which was applicable to the sales of such oil and gasoline by the manufacturer or producer after the effective date of the tax. There is no realistic distinction between a transfer from one subsidiary to another subsidiary of the same parent, as in the present case, and a transfer from a parent to a subsidiary, as in the *Continental* case. The control of the taxable articles is no more changed in the former case than in the latter. Nor does the fact that there were minority stockholders in the instant case serve as a real distinction so long as there is complete and unquestioned control of the corporations involved. The interests of the minority were not antagonistic to the parent corporation to the extent that these transactions were involved, for any taxes that could be eliminated would benefit both. The result herein is therefore in substantial conflict with the *Continental Oil Co.* case.

2. The Circuit Court of Appeals was not justified in setting aside the District Court's finding that no business purpose was served by the transfer. There is ample evidence to support that finding and the contrary conclusion of the Circuit Court of Appeals completely ignores the fact that

the record is barren of any evidence showing any purpose other than tax avoidance for the interposition of the other subsidiary.

3. The decision below is based upon insubstantial distinctions which jeopardize the effective application of a principle which is necessary to safeguard the revenue. The decision of the Circuit Court of Appeals is contrary to the principles approved by this Court in *Griffiths v. Commissioner*, 308 U. S. 355, and *Higgins v. Smith*, 308 U. S. 473, where the Court refused to recognize as effective for tax purposes transfers of property by taxpayers to their wholly owned corporations, there being no real change in the control of the property.

CONCLUSION

It is therefore respectfully submitted that this petition should be granted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1943.

